Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HOLLY LONG,
Petitioner

Vs.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, and STATE DEPARTMENT OF EDUCATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

A. Whether the District Court erred in denying the Petitioner's claim for monetary damages, and for greatly expanded "transitional services," under the IDEA and Section 1983 of the Civil Rights Acts.

B. Whether the District Court erred in concluding that a due process hearing was required for jurisdictional purposes in the District Court, rather than the complaint process that had been employed to obtain a State education department decision requiring the "transitional services" be provided to the Petitioner under the IDEA.

PARTIES TO THE PROCEEDINGS

Petitioner is Holly Long.

Respondents are the Dawson Springs, Kentucky, Independent School District, David Boggs, the ex-Superintendent of the Dawson Springs, Kentucky, Independent School District, the Commonwealth of Kentucky, and the State Department of Education of the Commonwealth of Kentucky

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit dated August 25, 2006, upholding the decision of the District Court which is not officially reported is reproduced by App. A

The ruling of the United States Court of Appeals for the Sixth Circuit, denying the Petition for Rehearing En Banc was issued November 13, 2006, was not officially reported and is reproduced by App. B

The decision and order of the United States District Court for the Western District of Kentucky dismissing the plaintiff's complaint dated December 20, 2004, which is not officially reported, and is reproduced at App. C

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on August 25, 2006, and the decision on the Petition for Rehearing En Banc was entered on November 13, 2006. This petition is timely under 28 U.S.C. Section 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the decision on rehearing. The court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. Section 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Section 1983 of the Civil Rights Act, 42 U.S.C., and the Individuals with Disabilities Act, 20 U.S.C. 1400,et seq., set our at App.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. Section 1331 (general federal question jurisdiction). The plaintiff's two federal claims are based upon allegations that the defendants violated Section 1983 of the Civil Rights Act and Section 1415 of the Individuals with Disabilities in Education Act. The complaint having been dismissed by the district court on defendant's Rule 12(b)(6) motion, the Record consists only of the plaintiff's original complaint

The Decision Below

The District Court Judge, John G. Heyburn II, dismissed the complaint, holding that:

> 1982 there is no basis for a Section 1983 due process clause claim by plaintiff, based on **Crocker v. Tennessee Secondary School Athletic Association**, 980 F.2d 382 (6th Cir. 1992);

2) the plaintiff must exhaust administrative remedies in a due process hearing under the IDEA before bringing claims under other statutes, such as Section 1983;

3) the complaint resolution procedure (CRP) is insufficient to satisfy the IDEA's administrative exhaustion requirements;

4) the Dawson Spring school district should provide the three years of compensatory education to plaintiff as directed by the Kentucky Department of Education, and previously ordered by the district court; and,

5) all of the remaining defendants were dismissed.

The Court of Appeals affirmed the ruling of the district court.

REASONS FOR GRANTING THE PETITION

The district court founded its denial of Section 1983 for IDEA jurisdiction based on **Crocker,** and represented that **Crocker** is consistent with the subsequent prevailing view among the circuits, citing the First, Second, fourth, Seventh, Eighth, and Ninth circuits as so holding.

To the contrary, not only do eight of the twelve circuits (District of Columbia, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth) support the view that Section 1983 damages may be applied to IDEA violations, but **Crocker** itself acknowledges that Section 1983 applies to the IDEA actions, but not for damages.

The result of **Crocker** may be to undermine the Court's carefully crafted jurisprudence on Section 1983, a result not likely intended by Congress, when it re-enacted the IDEA in 2004.

ARGUMENT

Initially, the Court's decision of December 20, 2004, although consistent with its previous ruling in dismissing the KDE and the Dawson Springs Superintendent, again conflicts directly with the intent of Congress, as indicated in 20 USC Section 1415(l) "Rule of Construction," and with the overwhelming majority of judicial precedent. The District Court indicates that there is no IDEA civil action that can employ Section 1983 of the Civil Rights Act. The Court is respectfully referred to the legislative history in the House Report on P.L. 105-17, page 124:

"Section 615(l) maintains the rights available under the Constitution, the Americans with Disabilities Act, title V of the Rehabilitation Act and other federal laws."

As codified, that Section 615(l) reads as follows:

> "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. Section 12101 et seq.] title V of the Rehabilitation Act of 1973 [29 U.S.C.A. Section 791 et seq.], ***or other Federal laws protecting the rights of children with disabilities***, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsection (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." (emphasis supplied)

The overwhelming majority (two-thirds) of federal circuit courts conclude that the IDEA is obviously one of the laws protecting the rights of children with disabilities.

Since the District Court has already concluded that the IDEA does not itself provide for the "relief" of damages against Dawson Springs, it should be apparent that the Plaintiff need not exhaust subsections (f) and (g).

Second, the Court's decision states that the Plaintiff must seek a due process hearing before bringing this matter to the district

court for hearing. Simple reference to the statutory provision indicates that it requires that a prospective plaintiff be "aggrieved" by the KDE decision resulting from Plaintiff's complaint. There is nothing in that KDE decision that aggrieves the Plaintiff, so she has no jurisdictional right to suit in the federal court on the basis of the decision, itself. It is only after both Dawson Springs and the KDE attempted to flout the law by refusing to implement the decision, that plaintiff has a right to a civil action in this Court.

From September, 1998, though well into 2000, Dawson Springs availed itself of the strange "due process" appeal rights accorded it by the KDE, but for which the District Court acknowledges that the District Court can find no legal basis. Even though Dawson Springs has consistently sought to diminish or destroy the Plaintiff's rights to compensatory education, and has never provided a recommended plan of its own (other than a dimunition of Plaintiff's plan). It is apparent that Dawson Springs was the aggrieved party by the KDE Report, that it received overly ample opportunity to contest that Report, but that rather than appealing that Report to a State or federal court, it allowed its appeal rights to lapse --- thus making the Report res judicata. The rule is simple: Dawson Springs contested the KDE report *ad infinitum* in 1998-2000, and that contested Report became final in 2000, with Dawson Springs having failed to exert its further appeal rights. Now, this Court would have the Plaintiff --- having prevailed in the KDE complaint process and Report --- to initiate another process to again prove her right. Put simply, Dawson Springs and the KDE should not be encouraged by this Court to relitigate the claim that they have consistently argued against, either in this jurisdiction, or any other. The finality of the judgment of the validity of the KDE Report has been substituted for their extinguished claims, and only that judgment can be enforced. They are barred from relitigating their claims. The District Court has now concluded that the Plaintiff must subject herself to a due process hearing to be conducted under the auspices of Dawson Springs and the KDE. These two governmental entities have demonstrated every interest in denying the Plaintiff the very benefits for which the IDEA provides. The KDE has admitted the Plaintiff should

receive these benefits. No, it long past time for this Court to take the bull by the horns and enforce the KDE report of September, 1998, rather than to further frustrate the intent of Congress by delaying for additional months while a due process hearing can be convened and completed. Substantial additional costs are being incurred by all the parties before this matter is again brought before this Court. Dawson Springs further demonstrates its obstructionist negativity (that the District Court is so well aware of) and refers to in its decision. The District Court admits its lack of expertise in the filed of education, and has itself appointed Dr. Debra Bauder and Dr.Robert Glass as its advisory experts, yet has failed to accept their written advice that more intense services be provided, and that both physical and occupational therapy be given to Holly Long.

The Congress has repeatedly made evident to the federal courts that it does not want continuing delays, harassment, and dismissal of IDEA related suits initiated to enforce the statute. The Congress in 1986 added Section 1415(f) to the IDEA, because of the Supreme Court's decision in **Smith v. Robertson**, 468 U.S. 992(1984), which held that the IDEA precluded claims under the Rehabilitation Act and the Equal Protection Clause. If Section 1415(f) seems remarkably similar to Section 1415(l) of P.L. 105-17, it says practically the same thing --- "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities"

As noted above, P.L. 105-17 clearly elaborates on that admonition of congressional intent. Many courts have acknowledged and implemented this congressional intent. This District Court still has not, and Plaintiff is at a quandry as to why not. It is certainly not because Plaintiff has not repeatedly brought this congressional intent to the District Court's attention.

In spite of the District Court's reluctance to accept the application of Section 1983 to this IDEA matter, it still ordered the Dawson Springs School District to initiate and complete three years of transitional training for Plaintiff, in its final order, upon which this appeal is based.

Such disapproval by the District Court of Congress's intent is totally without legal reason, and not indicative of a justice system of law, but of men. Plaintiff provides (below) extensive quotes from the Congressional Record, and the GAO report, indicative of the intent of Congress, and of the extent of the problem in implementing the IDEA. However, immediately following is an extensive discussion of the jurisprudential background as indicated in the Court's decision.

COMPARATIVE JURISPRUDENCE

1982 **Crocker v. Tennessee Secondary School Athletic Association**, 980 F.2d 382 (6th Cir. 1992),

Of course, as the District Court mentions, Plaintiff believes that **Crocker** should be disregarded as precedent in this Sixth Circuit. As the Plaintiff stated in **W.B. v. Matula**, 67 F.3d 484, 494 (3rd Cir. 1995) and **Walker v. District of Columbia,** 969 F.Supp. 794, 796 (D.D.C.1997), explain that "the Sixth Circuit in Crocker did not address the legislative history of Section 1415(f)" and that "Congress added this section to the IDEA in order to overturn the Supreme Court's decision in *Smith v. Robinson*, . . ., in which the Court held that the IDEA precluded claims under the Rehabilitation Act and the Equal Protections Clause. *See W. B. v. Matula* . . . describing in detail the legislative history of Section 1415(f)."

> "Furthermore, as the Supreme Court has held, once a cause of action is established, courts should 'presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.' *Franklin v. Gwinnett County,* 503 U.S. 60, 66, 112 S. Ct. 1028, 1032, 117 L.Ed. 2d 208 (1992)" (Walker, at 797)

Crocker's basic premise is that money damages are not available for IDEA violations. **W.B.** states: "Section 1983 supplies a private right of action for the instant case. . . . We agree, and thus hold that Plaintiffs may seek monetary damages directly under

Section 504, as well as the Section 1983 claim predicated on Section 504." (at 494)

The Court also refers to **Gardenshire v. Schubert**, 205 F.3d 303 (6th 2000) for the proposition that the Sixth Circuit has said that a Section 1983 lawsuit may not expand existing statutory rights. **Gardenshire** is an arrest without probable cause case, and not on point with **Crocker**, and IDEA jurisprudence.

B. **W. B. v. Matula**, and **Salley v. St. Tammany Parish School Bd.**, 57 F.3d 458 (5th Cir. 1995)

The Court cites **W.B.** and **Salley** as evidence that both the Third and Fifth Circuits addressed the issue of Section 1983 damages, "without stating a definite 'no.'" Plaintiff must take issue with the representation that **W.B.** does anything but unequivocally support the use of Section 1983 --- "Accordingly, section 1983 supplies a private right of action for the instant case." (at 494) Any other representation is inaccurate.

The District Court represents **Salley** as an instance where Section 1983 damages were not provide for, and, indeed, the court in **Salley** does not mention Section 1983, but does say: "The district court acted correctly when it awarded only nominal damages."

The District Court represents that: "despite its brief and less than compelling analysis, *Crocker* is consistent with the subsequent prevailing view among the circuits. . . . The First, Second, Fourth, Seventh, Eighth and Ninth Circuits have also held that damages are unavailable under the IDEA."

Plaintiff has examined such representation, and the cases the Court cites, and has found the following examples to not support that statement:

First Circuit – **Nieves-Marquez v. Puerto Rico**, 353 F.3d 108 (2003) – wherein that court cites **Sellers**, **Crocker**, and **Heidemann**, and that, "The Supreme Court has held that compensatory damages are generally available under both statutes." (Section 504 and Title II) But then the court concludes that, "At this point, we cannot say with certainty that a damages award under Section 504 or title II is precluded on these pleadings, at least for intentional conduct causing economic harm." (at 127) No mention is made of damages under Section 1983 being precluded.

Fourth Circuit – **Sellers v. School Bd. of City of Manassas, Va.** 141 F.3d 524 (1998) – the court argues that Section 1983 protects for Constitutional violations, but not IDEA violations, "notwithstanding the similarity of such claims to those stated directly under the IDEA."(at 530)

> "When construed in their most natural form, the excerpts (of the House report) demonstrate the unremarkable proposition that Congress intended section 1415(f) to restore the ability of disabled children and their parents or guardians to utilize section 1983 to protect constitutional rights." (at 531)

Seventh Circuit – **Charlie F. v. Bd. of Educ. of Skokie School Dist.**, 98 F.3d 989 (1996) – the court bases its conclusion on its previous holding that the Education for All Children Handicapped Act was held not to provide for damages, and that **W.B v. Matula** is in accord with that position. To the contrary, **W.B.** says: "We agree, and thus hold that plaintiffs may seek monetary damages directly under Section 504, as well as the Section 1983 claim predicated on Section 504." (at 494)

Plaintiff has examined in detail that jurisprudence that the District Court cited, and considerably more, and concludes that eight of the twelve circuits have jurisprudence that supports the principle that monetary damages are available under Section 1983 in IDEA matters, and the following presents such precedents and representative statements therefrom:

District of Columbia Circuit –

Samuels v. District of Columbia, 770 F.2d 184, 195 (1985)

Second Circuit –

PC v. McLaughlin, 913 F.2d 1033, 1044 (1990)

Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (1987)

Quackenbush v. Johnson City School District, 716 F.2d 141, 148 (1983)

Third Circuit –

W.B. v. Mastula, 67 F.3d 484, 494 (1995)

Jeremy H. by Hunter v. Mount Lebanon School Dist., 95 F.3d 272, 279 (1996)

Fourth Circuit –

Robinson v. Pinderhughes, 810 F.2d 1270, 1274 (1987)

Fifth Circuit –

Fontenot v. Louisiana Bd. of Elementary & Secondary Educ., 805 F.2d 1222 (1986) – In response to **Smith v. Robinson**, 468 U.S. 992 (1984), Congress "acted swiftly, decisively, and with uncharacteristic clarity to correct what I viewed as a judicial misinterpretation of its intent." Congress amended the Act in 1986 to state specifically that the EHA is not the exclusive avenue through which parents may enforce the rights of their handicapped children. [See: The Handicapped Children's Protection Act of 1986 P.L. No. 99-372 Section 3, 100 Stat. 796 (1986), to be codified as 20 U.S.C. Section 1415(f)]

St. Tammany Parish Sch. Bd. v. State of La., 142 F.3d 776 (1998) – does not refer to Section 1983 action, but states: "See 20 U.S.C. Section 1415(e)(2) (authorizing court to 'grant such relief as the court determines is appropriate'); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369-70, 105 S.Ct. 1996, 2002-03, 85 L.Ed.2d 385 (1985)" (at 782)

Angela L. v. Pasedena, 918 F.2d 1188, 1193 (1990)

Seventh Circuit –

Marie O. v. Edgar, 131 F.3d 610, 622 (1997)

Mallett v. Wis. Div. of Vocational Rehabilitation, 130 F.3d 1245 (1997) –

> "We fail to locate any congressional intention to foreclose a Section 1983 remedy for the enforcement of Title I for three reasons. First, the presence of administrative channels for a beneficiary to dispute the content on an IWRP does not preclude judicial review under Section 1983. . . . Second, the existence of a judicial remedy does not foreclose the availability of a Section 1983 remedy. . . . Finally, unlike the statutes in *Sea Clammers* and *Smith v. Robinson*, the only discernable congressional intent in the Rehabilitation Act is not to supplant the Section 1983 remedy. . . . Thus,

Mallet may challenge whether DVR's policy disfavoring funding graduate school education violates his right to an IWRP under Section 1983." (at 1256-57)

Eighth Circuit –

Digre v. Roseville Schools Ind. D., 841 F.2d 245 (1988)

"On appeal from the district court's denial of her motion, Mrs. Digre argues that the court erred in concluding that a 42 USC Section 1983 action is not available to remedy violations of the EHA or the due process clause of the fourteenth amendment. We agree. A section 1983 action lies when a defendant acting under color of state law violates a right secured by the Constitution or federal law." (at 249)

Nor is there any indication that Congress has changed its mind in the eighteen years since 1986. The IDEA legislation was signed into law on December 3, 2004, and there is not indication to the Plaintiff that Congress did not intend Section 1415(l) to apply to this matter.

Ninth Circuit –

Even as Congress acted in 1986 to make it abundantly clear that its intent was to allow employment of Section 1983 in the protection of the disabled, **Doe by Gonzales v. Maher**, 793 F.2d 1470 (1986), made no mention of the legality of a Section 1983 action. However, in the only three district court decisions of which Plaintiff is aware in the 9th Circuit [**Emma C. v. Eastin**, 985 F.Supp. 940 (N.D. Cal. 1997), **Goleta Union Elementary School Dist. v. Ordway**, 166 F. Supp. 2d 1287 (C.D. Cal. 2001), and **Roe Ex Rel. Preschooler II v. Nevada**, 332 F. Supp. 2d 1331 (D. Nev. 2004)] , they found that:

"A split currently exists among the federal circuits whether a statutory violation of the IDEA creates a sufficient basis to anchor a claim under section 1983. The Ninth Circuit has yet to decide this issue, however, Defendants content that

the circuits whose reasoning prohibits section 1983 claims based on IDEA comport with the Ninth Circuit's holdings regarding section 1983 in general. Additionally, Defendants argue that the logic and reasoning of the courts prohibiting section 1983 based on IDEA is sound and persuasive.

"The Court disagrees and is persuaded by the reasoning of the Central and Northern Districts of California that Congress expressly authorized section 1983 suits to vindicate violations of IDEA-protected rights. *See Emma C.* . . . see also *Goletta* . . . ." (**Roe Ex Rel. Preschooler II v. Nevada**, page 1342)

CONGRESSIONAL INTENT – AS ILLUSTRATED IN 2004

In his speech on the floor of the Senate on November 19, 2004, (Congressional Record, page S11547) in support of the IDEA of 2004, Senator Tom Harkin of Iowa made reference to a Government Accountability Office (GAO) Report prepared at the request of Senator Edward Kennedy of Massachusetts, and entitled *Special Education: Improved Timeliness and Better Use of Enforcement Actions Could Strengthen Education's Monitoring System.* The basis of the Report is that the United States Department of Education from 1997 to 2003 visited 31 states and did analysis of violations of the IDEA. All but one state evidenced an average of eight major violations, with the majority being for failure to provide actual services to children. Kentucky was not one of the 31 states, but with 11 of the 30 states, had "Special conditions" imposed on it by the U.S. Department of Education (DOE) because of "Participation and reporting on alternate assessments," and such "Special conditions" are not yet resolved against the State of Kentucky. (page 32 of the Report)

Senator Harkin then stated:

"As part of the enforcement of this law, States must ensure that local education agencies are meeting their targets to provide a free, appropriate public education. If they fail to

do so, the State must take action, including prohibiting the flexible use of any of the local education agency's resources."

In its Report to Senator Kennedy dated September 9, 2004, the GAO specified:

"As a condition of receiving IDEA funding, states agree to comply with certain requirements regarding the educational and related services provided to disabled children. These requirements include the development of an individualized education program (IEP) that outlines the specific services to be provided to each student based on individual needs. For students over the age of 14, IEPs must include a statement of transition services to be provided to students to help them obtain the educational and vocational skills needed to improve the likelihood of self-sufficiency once they leave school." (page 1)

It is particularly such transition services that Plaintiff seeks, and part of which the Court has already ordered.

The GAO Report continues:

"When IDEA was reauthorized in 1997, Congress placed new emphasis on state and local accountability for complying with IDEA and improving educational outcomes, such as graduation and other measures of postsecondary success, for such disabled students. The reauthorized law made each state's annual federal funds conditional on its success in providing a free appropriate public education in the least restrictive environment." (page 1)

* * * *

"In the event of noncompliance, education (U.S. DOE) has the specific authority to employ six sanctions: (1) imposing restrictions or "special conditions" on a state's IDEA grant award; (2) negotiating a long-term compliance agreement with a state requiring corrective actin within 3 years; (3) disapproving a state's application for funds when the

application does not meet IDEA eligibility requirements; (4) obtaining a 'cease and desist' order to a state to discontinue a practice or policy that violates IDEA; (5) withholding IDEA funds in whole or in part depending on the degree of the state's noncompliance; and (6) referring a noncompliant state to the Department of Justice for appropriate enforcement action." (page 7)

* * * *

"Although corrective action plans have a 1-year timeframe for completion according to Education policy, our analysis showed that most cases of noncompliance addressed through this method remained open for years. We found that only 7 of 30 states with finding of noncompliance visited from 1997-2002 had completely resolved their deficiencies as of May 2004. Closure of these cases, that is resolution of all deficiencies, took from 2 to 7 years from the time the deficiencies were first identified during a monitoring visit. Of the remaining 23 cases, about half have been unresolved for 5-7 years." (page 17)

Debate in Congress that year was consistent in relation to the intent of the IDEA, and of the problems of delays and derelictions by local and state educational entities.

Senator Kennedy of Massachusetts reassured the Senate that complaints of "costly litigation" should be assuaged by the legislation's implementation of the standards of **Christiansburg Garment Co. v. EEOC,** 434 U.S. 412 (1978) which would punish spurious litigants. (Cong. Rec., November, 19, 2004, pages S11543-11548)

Mr. Gregg of New Hampshire stated:

"We have developed a whole series of initiatives to try to, for better or worse, create dispute resolution in a more comfortable manner rather than a confrontational and litigious manner." (Cong. Rec., May 13, 2004, page S5405)

Senator Kennedy referred to:

"Reports from the Department of Education (which) show just how rampant non-compliance with the IDEA is. From 2000 to 2003: 76 percent of States did not appropriately resolve complaints: . . . and 65 percent of states did not appropriately prepare students for post-school employment and independent living."

And finally, from the Congressional Record of November 17, 2004, page H9948: "Strike (G) and insert the following: '(G) Rule of construction. --- Nothing in this section shall be construed to affect the right of a parent to file a complaint with the State educational agency, if such agency offers and conducts appeals."

ARGUMENT ON THE LEGALITY OF THE COMPLAINT PROCESS

Statutory and Regulatory Background

In 1975, finding that more than half of the nation's eight million children with disabilities were not receiving appropriate educational services, Congress appropriated federal funds for state special education programs and made them available on the condition that states implemented policies assuring a "free appropriate public education," sometimes referred to as "FAPE," all children with disabilities. Known then as the Education of All Handicapped Children Act ("EHA"), and today named as the Individuals with Disabilities Education Act ("IDEA"), the law "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." [See: **Honig v. Doe**, 484 U.S. 305, 310, 108 S.Ct. 592, 98 L.Ed 2d 686 (1988); also, **Bd. of Educ. v. Rowley**, 458 U.S. 176, 188-89, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] holding that the EHA established right to public education for students with disabilities that "consist of education instruction specially designed to meet the unique needs of the handicapped

Mrs. W. v. Tirozzi, 832 F.2d 748 (2nd Cir. 1987) – " Exhaustion is not an inflexible rule." (page 756)

From 1985 House of Representatives Report No. 296, 99th Cong., 1st Sess. 4 (1985): Situations where administrative exhaustion would be futile or inadequate include complaints that:

> "1) it would be futile to use the due process procedures . . . ; 2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; 3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought) . . . . " (See: **Mrs. W. v. Tirozzi**, page 756)

1992 – **Cordero by Bates v. Pennsylvania Dept. of Educ.**, 795 F.Supp. 1352 (M.D.Pa.)

- "A state must, moreover, ensure through oversight that state and local agencies, including school districts, fulfill the dictates of the Act. . . . If local districts are failing to fulfill their mandates under the IDEA and state law, the state is required to step in and provide such assistance directly." (at 1360) . . . . The violation of even one child's rights under the Act is sufficient to visit liability on the state." (at 1363)

Courts universally recognized that parents need not exhaust the procedures set forth in 20 U.S.C. Section 1415 where resort to the administrative process would be either futile or inadequate. Excusing exhaustion in cases of futility and inadequacy is based both on general exhaustion principles [See: Jacob Stein, Glenn Mitchell & Basil Mezines, Administrative Law, Section 49.02 (1992)], and on the legislative history of the IDEA. In addition to these two exceptions, the legislative history notes a third exception:

> "[T]here are certain situations in which it is not appropriate to require the use of due process and review procedures set out in [20 U.S.C. Section 1415(b) and (c) of the [IDEA] before filing a law suit.

These include complaints that: (1) it would be futile to use the due process procedures . . .; (2) *an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law*; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought. . . ."

H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)(emphasis added)."(at 1303-4)

1982 – **Patsy v. Board of Regents of State of Fla.**, 457 U.S. 496 – ". . .(W)e believe that the tenor of the debates over section 1 supports our conclusion that exhaustion of administrative remedies in Section 1983 action should not be judicially imposed." (at 502)

The IDEA creates a "right, enforceable in federal court, to the free appropriate public education required by the statute." [See: **Smith v. Robinson**, 468 U.S. 992, 1002 n. 6, 104 S. Ct. 3457, 82 L.Ed 2d 746 (1984), *superseded by statute on other grounds by* Pub. L. No. 99-372, 100 Stat. 796 (1986)]. Before bringing a suit based on a violation of this right, a complainant must normally exhaust the due process hearing procedures required by 20 U.S.C. Section 1415. The IDEA's exhaustion requirement applies to suits under "other Federal laws protecting the rights of children with disabilities . . . seeking relief that is also available under" the IDEA [See: 20 U.S.C. Section 1415(l) The exhaustion requirement is not, however, a rigid one. [See: **Hoeft v. Tuscon Unified Sch. Dist.**, 967 F.2d 1298, at 1302-03 (9th Cir. 1992)] courts universally recognize that parents need not exhaust the procedures set forth in 20 U.S.C. Section 1415 where resort to the administrative process would be either futile or inadequate." (at 1303)

There should be no dispute that the IDEA requires the implementation of the final decision of KDE complaint procedure. [See: **Robinson v. Pinderhughes**, 810 F.2d 1270, 1274 (4th Cir. 1987), holding that the IDEA's procedural requirements "can only be fairly construed to contemplate that once a final favorable

administrative decision has been gained by the plaintiff, the State will carry out that decision although it may have opposed the position of the plaintiff in the administrative proceedings." Also see: **Jeremy H. v. Mount Lebanon Sch. Dist.**, 95 F.3d 272, 2679 n. 13 (3rd Cir. 1996): "[I]t [would] be curious for Congress to have established section 1415's detailed procedural apparatus solely in order to generate advisory opinions."]

Like under the APA or the CRIPA, the IDEA's exhaustion scheme was carefully designed to balance the individual complainant's interest in retaining prompt access to a judicial forum and the countervailing institutional interests favoring exhaustion. [See: **Hoeft**, at 1303, discussing policies served by the

IDEA EXHAUSTION REQUIREMENT

Because the CRP "is a creature of the (Department's) own regulations, (its) interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation." [See: **Auer v. Robbins**, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed. 2d 79 (1997)] According to the Department of Education, the CRP is intended to "allow (parents and school districts) to resolve differences without resort to more costly and litigious resolution through due process," not to create a mechanism that must be exhausted in addition to the due process system. [See: Assistance to States for the Education of Children with Disabilities, 64 Fed Reg. 12,406, 12,646 (March 12, 1999); and also, Office of Special Education Programs Memorandum 00-20 (July 17, 2000), describing CRP regulations as an attempt to provide "a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system"

Hoeft states that on a case by case basis, district courts may choose to require or to accept exhaustion of the CRP "as a substitute for exhausting IDEA procedures in challenges to facially invalid policies." (at 1308) "(A)dministrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies." (*Id.*) In accord with this rationale, the

court suggested that the filing of a CRP complaint may be sufficient to meet the exhaustion requirement "where the only purposes served by exhaustion are to notify the state of local noncompliance and to afford it an opportunity to correct the problem." (at 1308)

The statement in **Hoeft** that the CRP may serve as a substitute for due process system exhaustion is consistent with the traditional exception to exhaustion requirements based on futility in inadequacy. [See: **Honig**, at 327] Where the challenge is to a facially invalid policy, and the state refuses to alter the policy after a CRP complaint, then further exhaustion may be excused because "the administrative body is shown to be biased or has otherwise predetermined the issue before it." [See: **McCarthy v. Madigan**, 503 U.S. 1081 (1992)] Exhaustion for a CRP may also render the due process hearing futile where all the educational issues were resolved, leaving only issues for which there is no adequate administrative remedy. [See: **Witte v. Clark County Sch. Dist.**, 197 F.3d 1271, 1275-76 (9th Cir. 1999)]

Also, the Office of Special Education of the U.S. Department of Education, in its Programs Memorandum 94-16, 21 Disab. Educ. L. Rep. 85 (March 22, 1994), describes the CRP regulations as establishing a process that may be used "in lieu of the due process hearing system."

If Plaintiff is required by the IDEA to, thirteen years after she entered Dawson Springs schools, to initiate a due process hearing to verify what the KDE has already found to be true, it would be futile, and a travesty.

Conclusion

Plaintiff has carefully and meticulously considered the Court's dismissal of her complaint, and found that there is no legal justification for either its refusal to apply the principle of *res judicata* to the claims of Dawson Springs and KDE, nor to admit the overwhelmingly prevalence of Section 1983 damage rights for Plaintiff. It should distinguish the holding in **Crocker** as not being based on the intent of Congress.

Likewise, the District Court's refusal to grant jurisdiction because Plaintiff has not exhausted its due process hearing rights does not preclude the use of complaint procedure rights.

The petition for writ of certiorari should be granted

Respectfully submitted,

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APPENDICES

A – Decision of the Sixth Circuit Court of Appeals

B – Decision on Request for Rehearing by the Sixth Circuit Court of Appeals

C – Decision of the District Court

Statutes

STATUTES AT ISSUE IN THE PETITION FOR CERTIORARI

Title 42 – The Public Health and Welfare

Section 1983 - Civil action for deprivation of rights

Every person who, under color of an statue, ordinance, regulation, custom, or usage, of an State or Territory of the District of Columbia, subjects, or causes to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory degree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 20 – Education

Section 1415 – Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local education agency that receives assistance under this part [20 USC Sections 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Type of procedures. The procedures required by this section shall include---

(1) an opportunity for the parents of a child with disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;
(3) written prior notice to the parents of the child whenever such agency ---
    (A) proposes to initiate or change; or
    (B) refuses to initiate or change;
    the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;
(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;
(5) an opportunity for mediation in accordance with subsection (e);
(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;
(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)---
    (A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and
    (B) that shall include---

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time, and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice. The notice required by subsection (b)(3) shall include---

(1) a description of the action proposed or refused by the agency;

(2) a explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused actions;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USC Sections 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USC Sections 1411 et seq.].

(d) Procedural safeguards notice. (1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum---

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6).

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that state);

(L) Civil actions; and

(M) Attorneys' fees.

(e) Mediation. (1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USC Sections 1311 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a

minimum, shall be available whenever a hearing is requested under subsection (f) or (k)

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USC Sections 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to used the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with---

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683 [20 USC Sections 1482 or 1483]; or

(ii) an appropriate alternative dispute resolution entity;

to encourage the sue, and explain the benefits of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing. (1) In general. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations. (A) In general. At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to sue at the hearing.

(C) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing. A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision.

The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded---

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c).

(i) Administrative procedures. (1) In general. (A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(2) Right to bring civil action. (A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements. In any action brought under this paragraph, the court---

(i) shall receive the records of the administrative proceedings;

(iii) shall hear additional evidence at the request of a party; and

(iv) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees. (A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with disability who is the prevailing party.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be sued in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if---

(I) the offer is made within the time prescribed by Rule 86 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F)Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that---

(i)the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii)the time spend and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv)the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7);

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(H) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in

any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j)Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section. Unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.